

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

J.D. JONES BARTON,

Plaintiff,

v.

No. C13-5382 BHS/KLS

JOHN D. SNAZA, JAMES DOWNING,
GEORGE EATON, DEBORAH
THOMPSON, VALERIE PETERS,
THREASA BECKER, TODD L.
THOMA, JON TUNHEIM, SCOTT M.
JACKSON, OLIVIA ZHOU,

Defendants.

REPORT AND RECOMMENDATION
Noted For: October 25, 2013

Plaintiff J.D. Jones Barton is a prisoner at the Thurston County Correctional Facility (TCCF). His *pro se* complaint names various employees of the TCCF and three Thurston County prosecutors. Mr. Barton alleges that he has been denied access to courts and the freedom to practice his religion in violation of the First Amendment, that he has been denied access to counsel in violation of the Sixth Amendment, that his Fifth and Fourteenth Amendment due process rights have been violated, that he has been subjected to cruel and unusual punishment in violation of the Eighth Amendment, and that the defendants and “their respective state agencies current practice, custom and policy” violate the “Separation of Powers Doctrine.” ECF No. 7. Plaintiff also filed a motion for the appointment of counsel. ECF No. 8.

On May 31, 2013, this Court declined to serve the complaint, noting several deficiencies, but provided Mr. Barton an opportunity to file an amended complaint or show cause why his

1 complaint should not be dismissed for failure to state a claim under 28 U.S.C. § 1983. ECF No.
2 9. The Court also denied the motion for appointment of counsel. *Id.* Mr. Barton was given an
3 extension of the original deadline to respond to the Court's Order. ECF No. 12. On July 5,
4 2013, following an extension of his deadline to do so, Mr. Barton filed an amended complaint,
5 response to order to show cause, motion for copies without cost, motion for reconsideration of
6 the Court's order denying the appointment of counsel, and a motion to recuse the undersigned.
7 ECF Nos. 13-17. The motion to recuse was denied by Chief Judge Pechman. ECF No. 21. The
8 undersigned denied the remaining motions. ECF Nos. 22 and 23.

10 On August 7 and 13, 2013, Plaintiff filed a motion to consolidate cases, motion for order
11 transferring ECF for review hearing, motion for reconsideration, motion to compel, notice for
12 review of prejudice, and motion to compel. ECF Nos. 24-31. The motions were denied. ECF
13 No. 34. The Court explained to Plaintiff that it had not yet directed service of Plaintiff's
14 amended complaint and that the second amended complaint was deficient. *Id.* On August 19,
15 2013, the Court issued a second order to amend or show cause. ECF No. 35. In response,
16 Plaintiff filed another series of meritless motions. EF Nos. 36, 39, 40, 41, and 42. The motions
17 were denied. ECF No. 45. The undersigned again advised Plaintiff that there is no viable
18 complaint in this matter and therefore, no defendants have been served. Consequently,
19 Plaintiff's motions were either without merit or premature. Plaintiff was directed to comply with
20 the Court's second order to amend or show cause. ECF No. 45.

23 The Court has repeatedly advised Mr. Barton that his failure to file an amended
24 complaint or adequately address the deficiencies noted would result in a recommendation that his
25 case be dismissed as frivolous and counted as a "strike" under 28 U.S.C. § 1915(g). *See, e.g.,*
26 ECF No. 35, p. 13.

1 In response, Mr. Barton filed another motion to stay. ECF No. 46. In this motion, Mr.
2 Barton asks the Court to stay his civil rights action while he pursues state court adjudication of
3 his 2008 criminal case. ECF No. 46.

4 Having reviewed the complaint, subsequent motions, and record, the Court recommends
5 that Mr. Barton's complaint be dismissed prior to service without prejudice and that the
6 dismissal count as a strike under 28 U.S.C. § 1915(g).
7

8 DISCUSSION

9 Complaints such as Mr. Barton's are subject to the court's *sua sponte* review under
10 provisions of the Prison Litigation Reform Act of 1995 ("PLRA"), Pub.L. No. 104-134, 110
11 Stat. 1321 (1996). *See* 28 U.S.C. § 1915A(a). The court shall dismiss such a complaint, at any
12 time, if the court finds that it (1) is frivolous or malicious, (2) fails to state a claim on which
13 relief may be granted, or (3) seeks monetary relief from a defendant immune from such relief.
14 *See* 28 U.S.C. § 1915(e)(2)(B) (in forma pauperis complaints); *Lopez v. Smith*, 203 F.3d 1122,
15 1126-27 and n. 7 (9th Cir.2000) (en banc).
16

17 The same standard is applied in PLRA review for failure to state a claim and in reviewing
18 a motion to dismiss under Fed.R.Civ.P. 12(b)(6). *See Barren v. Harrington*, 152 F.3d 1193,
19 1194 (9th Cir.1998). A complaint is properly dismissed under Rule 12(b)(6) unless it contains
20 "enough facts to state a claim to relief that is plausible on its face." *Coto Settlement v.*
21 *Eisenberg*, 593 F.3d 1031, 1034 (9th Cir.2010) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 697
22 (2009). Well-pleaded factual allegations are taken as true, but conclusory statements or "bare
23 assertions" are discounted. *See Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir.2012); *see*
24 *also Iqbal*, 556 U.S. at 681.
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1 If the court finds that a complaint should be dismissed for failure to state a claim, the
2 court may dismiss with or without leave to amend. *Lopez*, 203 F.3d at 1126–30. Leave to
3 amend should be granted if it appears that defects can be corrected, especially if the plaintiff is
4 appearing pro se. *Id.* at 1130–31; *see also Cato v. United States*, 70 F.3d 1103, 1106 (9th
5 Cir.1995). If, after careful consideration, it is clear that a complaint cannot be cured by
6 amendment, the court may dismiss without leave to amend. *Cato*, 70 F.3d at 1107–11.

7
8 **A. Rule 8(a) Short and Plain Statement**

9 Mr. Barton’s amended complaint (ECF No. 13), which supercedes his original complaint
10 (ECF No. 7), should be dismissed for failure to comply with Rule 8. Rule 8 requires the pleader
11 to set forth his averments in a simple, concise, and direct manner. *See McNeil v. United States*,
12 508 U.S. 106, 113 (1993) (federal rules apply to all litigants, including prisoners lacking access
13 to counsel); *Crawford–El v. Britton*, 523 U.S. 574, 598 (1998) (encouraging “firm application”
14 of federal rules in prisoner cases); *McHenry v. Renne*, 84 F.3d 1172, 1177–78 (9th Cir.1996)
15 (affirming Rule 8 dismissal of complaint that was “argumentative, prolix, replete with
16 redundancy, and largely irrelevant” and providing an example of a properly-pleaded claim,
17 which could be “read in seconds and answered in minutes”).

18
19 Mr. Barton fails to provide a short and plain statement of the claim showing that he
20 is entitled to relief. In his twenty-eight page, single-spaced, and handwritten complaint,
21 accompanied by 284 pages of exhibits, he names thirteen defendants who have allegedly
22 engaged in a multitude of “impedment [sic] barriers” over more than a year relating to the
23 conduct of one or more of Mr. Barton’s criminal cases. Due to rambling and unfocused nature of
24 Mr. Barton’s allegations, the Court is unable to reasonably discharge its screening responsibility
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1 under § 1915A until Mr. Barton complies with the pleading requirements set forth in Rule 8.
2 Despite being given several opportunities to do so, Mr. Barton has failed to provide a short and
3 plain statement of the claim showing that he is entitled to relief. Dismissal of his complaint
4 without prejudice is therefore proper.

5 In addition, Mr. Barton's amended complaint may be dismissed for failure to state a
6 viable Section 1983 claim.

7
8 **B. Thurston County Prosecutors - Immunity**

9 Mr. Barton names Thurston County Prosecutor Jon Tunheim and Deputy Prosecutors
10 Scott M. Jackson and Olivia Zhou. ECF No. 13. The Court previously advised Mr. Barton that
11 state prosecutors are entitled to absolute prosecutorial immunity for acts taken in their official
12 capacity. *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993); *Imbler v. Pachtman*, 424 U.S. 409,
13 430 (1976) (Prosecutorial immunity protects eligible government officials who perform
14 functions "intimately associated with the judicial phase of the criminal process.")

15
16 Mr. Barton alleges that the prosecutors named in his amended complaint were aware that
17 Mr. Barton believed that he was being denied access to his legal materials and a speedy trial, and
18 that they misrepresented facts in his criminal case. *See e.g.*, ECF No. 13, pp. 6 and 18. These
19 facts do not demonstrate that the prosecutors are exempt from immunity. Mr. Barton was given
20 several opportunities to explain why he should be allowed to proceed against these defendants
21 despite federal law to the contrary but has failed to do so.

22
23 **C. Thurston County Sheriff and Deputies**

24 Mr. Barton alleges that the Thurston County Sheriff and various deputies failed to
25 provide him with access to his legal materials, prevented him from making photocopies, failed to
26 allow him to visit with his attorney, searched his cell and confiscated his legal materials,

1 searched his confidential legal papers (including an “attorney-client letter”), rejected an
2 incoming mailing that contained a civil rights complaint form, refused to provide him with
3 writing paper and pencils, prohibited his counsel from providing him with sticky notes, pens, and
4 “white-out,” searched his confidential legal materials, refused to process his grievance regarding
5 the withholding of his in-coming mail, prevented him from making copies for his arraignment.
6 ECF No. 13. These events apparently occurred primarily during Mr. Barton’s criminal case,
7 Thurston County Superior Court Case No. 08-1-00727-1, where he had been granted leave to
8 withdraw his guilty plea. *Id.*, at p. 6. Mr. Barton was represented by counsel in his criminal
9 case, which appears to be ongoing. His specific allegations against the Thurston County
10 Defendants are addressed below:

11
12 **1) Access to Courts**

13 Mr. Barton’s allegations regarding access to his legal paperwork, supplies, attorney-client
14 visitations, and photocopies are interpreted as a violation of his right to access the courts. He
15 was previously advised that he had failed to state a viable access to courts claim because he
16 failed to articulate any actual injury.

17
18 Inmates have a fundamental constitutional right of access to the courts and prison
19 officials may not actively interfere with Plaintiff’s right to litigate. *Lewis v. Casey*, 518 U.S. 343,
20 346 (1996). The right to assistance is limited to direct criminal appeals, habeas petitions, and
21 civil rights actions. *Lewis*, 518 U.S. at 354 (emphasis added). Prisoners also have the right to
22 pursue claims, without active interference, that have a reasonable basis in law or fact. *Silva v. Di*
23 *Vittorio*, 658 F.3d 1090, 1103-4 (9th Cir. 2011). This right forbids state actors from erecting
24 barriers that impede the right of access to the courts of incarcerated persons. *Id.* at 1102.
25 However, to state a viable claim for relief, a plaintiff must show that he suffered an actual injury,
26

1 which requires “actual prejudice to contemplated or existing litigation” by being shut out of
2 court. *Nevada Dep’t of Corr. v. Greene*, 648 F.3d 1014, 1018 (9th Cir.2011) (citing *Lewis*, 518
3 U.S. at 348, 351.

4 Mr. Barton alleges that he has been denied access to his legal materials, writing paper,
5 pencils, and photocopies and that as a result, he was denied a speedy trial. However, it is unclear
6 how the lack of these materials led to this result. In his amended complaint, Mr. Barton states
7 that the Washington Court of Appeals granted him leave to withdraw his guilty plea in Thurston
8 County Superior Court Case No. 08-1-00727-1 on July 17, 2012. ECF No. 13 at p. 6. After
9 several hearings, where he was apparently represented by counsel (who withdrew and was
10 replaced during this time), Mr. Barton withdrew his plea on December 20, 2012. *Id.* at p. 9. Mr.
11 Barton claims that he was unable to withdraw his plea sooner because defendants refused him
12 access to his legal documents and because they would not allow him to make copies of
13 documents to present to the Court. Mr. Barton does not explain what those documents were or
14 how his inability to make copies of the unidentified documents related to a delay in the
15 withdrawal of his plea. It is also unclear how a delay in the withdrawal of a guilty plea resulted
16 in a violation of Mr. Barton’s right to a speedy trial, or how Mr. Barton was otherwise harmed by
17 these “impedment [sic] issues.”

18 Mr. Barton also alleges that the Thurston County Jail maintains a policy that correction
19 staff are not allowed to make photocopies of inmate legal documents and that this policy violates
20 his right to access the courts. For example, he complains that when he asked to make
21 photocopies prior to his arraignment, he was refused and was told to look to his counsel for
22 assistance. While it is possible that failure to provide postage and photocopies might lead to a
23 finding that a prisoner has been denied access to the courts, it must be shown that the proceeding

1 involves access to the courts. *See, Sands*, 886 F.2d at 1170. Mr. Barton has not met his burden
2 of showing an actual injury here - an instance in which he was actually denied access to the
3 courts because of this policy.

4 In addition to the above deficiencies, it appears that Mr. Barton's state court criminal
5 proceedings are ongoing. *See* ECF No. 13 at Exhibit 2, p. 13 (5/22/13 Notice of Trial Date of
6 10/30/13). Generally, the federal courts will not intervene in a pending state court criminal
7 proceeding absent extraordinary circumstances where the danger of irreparable harm is both
8 great and immediate. *See Younger v. Harris*, 401 U.S. 37 (1971). "[O]nly in the most unusual
9 circumstances is a defendant entitled to have federal interposition by way of injunction or habeas
10 corpus until after the jury comes in, judgment has been appealed from and the case concluded in
11 the state courts." *Drury v. Cox*, 457 F.2d 764, 764-65 (9th Cir.1972) (per curiam); *see also*
12 *Carden v. Montana*, 626 F.2d 82, 83-84 (9th Cir.1980). Mr. Barton has made no showing of
13 extraordinary circumstances that would justify this Court's intervention in his ongoing state court
14 criminal proceedings.
15
16

17 It is apparently in conjunction with this state court proceeding that Mr. Barton now
18 requests a stay of this action. Such a stay is not warranted as Mr. Barton has not stated a viable
19 claim under § 1983 and there is no active complaint.
20

21 **2) Legal Mail**

22 Mr. Barton alleges that he received mail rejection notices on at least two occasions, on
23 March 8, 2013 ("DOJ approved print-outs and civil rights form") and June 21, 2013 ("materials
24 printed from the internet"), and that he protested the rejection of his mail in grievances. ECF No.
25 13 at pp. 13-14 and 22; 18-19. He also alleges generally of "unknown officers continuously
26

1 refusing to provide [him] with his incoming legal mail as provided to all other inmates.” *Id.* at p.
2 18.

3 Prisoners have a First Amendment right to send and receive mail. *Witherow v. Paff*, 52
4 F.3d 264, 265 (9th Cir.1995) (per curiam). A prison may adopt regulations that infringe on an
5 inmate’s constitutional rights if those regulations are “reasonably related to legitimate
6 penological interests.” *Turner v. Safley*, 482 U.S. 78, 89 (1987). Restrictions on incoming mail
7 are given closer scrutiny than those on outgoing mail, as internal mail has an obvious effect on
8 the internal environment of a prison, while outgoing mail poses less threat to prison security.
9 *Thornburgh v. Abbott*, 490 U.S. 401, 413–14 (1989).

11 Prison officials have a legitimate penological interest in inspecting an inmate’s outgoing
12 mail. *Witherow*, 52 F.3d at 265. Regulation of both incoming and outgoing mail is justified to
13 prevent criminal activity and to maintain prison security. *O’Keefe v. Van Boening*, 82 F.3d 322,
14 326 (9th Cir.1996). Prison officials may justifiably censor out-going mail containing
15 information about proposed criminal activity and may also visually inspect outgoing mail to
16 determine whether it contains contraband material which threatens prison security or material
17 threatening the safety of the recipient. *See Procunier v. Martinez*, 416 U.S. 396, 413 (1974);
18 *Witherow*, 52 F.3d at 266.

20 Prison officials may inspect non-legal mail for contraband without violating a prisoner’s
21 constitutional rights. *See Smith v. Boyd*, 945 F.2d 1041, 1043 (9th Cir.1991). In contrast,
22 “[legal] mail may be opened in the presence of the addressee and ... prison officials can require
23 both that the letters be specially marked with the name and address of the attorney and that the
24 attorney communicate first with prison officials.” *Sherman v. McDougall*, 656 F.2d 527, 528
25 (9th Cir.1981) (citing *Wolff v. MacDonald*, 418 U.S. 539, 575–77 (1974)). “[M]ail from the
26

1 courts, as contrasted to mail from a prisoner's lawyer, is not legal mail." *Keenan v. Hall*, 83 F.3d
2 1083, 1094 (9th Cir.1996). An isolated instance or an occasional opening of legal mail outside
3 of an inmate's presence does not rise to the level of a constitutional violation. *See Stevenson v.*
4 *Koskey*, 877 F.2d 1435, 1441 (9th Cir.1989).

5 Prisoners are entitled to certain procedural safeguards with regard to the rejection of their
6 mail. The "minimum procedural safeguards" are: (1) notifying the inmate that the mail was
7 seized; (2) allowing the inmate a reasonable opportunity to protest the decision; and (3) referring
8 any complaints to a prison official other than the one who seized the mail. *Martinez*, 416 U.S. at
9 417-18.
10

11 Mr. Barton acknowledges that he received notice of the mail rejections and that he had an
12 opportunity to grieve those rejections. He also alleges that the rejected mail contained
13 non-privileged materials. Despite being given several opportunities to do so, Mr. Barton has
14 failed to identify who is continuously refusing to provide him with his "incoming legal mail" and
15 does not identify the nature of the mail or when these refusals occurred. This claim should be
16 dismissed.
17

18 **3) First Amendment – Freedom of Religion**

19 Mr. Barton alleges that in February 2013, two of his "personal religious (Asatru/Odinist)
20 books" were confiscated by an unidentified person and that he was not therefore able to perform
21 an identified "solitary" "sacred worship/ritual/ceremonial rite within his cell" "as transcribed
22 within his two books" on February 14, 2013 (Freya/Vali Feast), March 21, 2013 ("Ostara"), and
23 May 13, 2013 ("Merry Moon"). He alleges that he grieved this issue and Sgt. Becker and H.
24 Peters refused to give him his religious books because they were not deemed "Holy Books." *See*
25 *e.g.* ECF No. 13 at pp. 27-28.
26

1 In order to implicate the Free Exercise Clause, the inmate's belief must be religious in
2 nature and sincerely held. See *Malik v. Brown*, 16 F.3d 330, 333 (9th Cir. 1994) (internal
3 quotations and citation omitted); *Shakur v. Schrivo*, 514 F.3d 878, 884-85 (9th Cir. 2008)
4 (adopting the "sincerity test" set forth in *Malik, supra*). Inmates with such beliefs have "[t]he
5 right to exercise [their] religious practices and beliefs...." *McElyea v. Babbitt*, 833 F.2d 196, 197
6 (9th Cir. 1987) (per curiam) (citing *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987)). A
7 free exercise violation occurs when the defendants burden the practice of an inmate's religion by
8 preventing the inmate from engaging in sincere religious conduct. See *Freeman v. Arpaio*, 125
9 F.3d 732, 736 (9th Cir. 1997), *overruled in part by Shakur*, 514 F.3d at 885. A mere
10 inconvenience does not give rise to a violation; the burden imposed must be substantial.
11 *Freeman*, 125 F.3d at 737.

12
13 A restriction on an inmate's First Amendment religious rights is valid if it is reasonably
14 related to legitimate penological interests. See *O'Lone*, 482 U.S. at 349 (quoting *Turner v.*
15 *Safley*, 482 U.S. 78, 89, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987)). The burden is on the prison
16 officials to prove that the restriction of the prisoner's exercise of religion was reasonably related
17 to a legitimate penological objective. See *Ashelman v. Wawrzaszek*, 111 F.3d 674, 677-78 (9th
18 Cir.1997) (applying test from *O'Lone and Turner* to determine reasonableness of decision
19 denying Jewish prisoner's request for an all kosher diet).

20
21 Mr. Barton was given several opportunities to amend his complaint as to this claim to
22 include factual allegations relating to the alleged violation of his religious rights and to
23 specifically identify the individual(s) who allegedly violated his religious rights. He has failed to
24 do so and this claim should be dismissed.
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1 **(4) Cell Search**

2 Mr. Barton alleges that he was subjected to an unlawful search of his cell and received an
3 infraction. ECF No. 13 at p. 11. The search of Mr. Barton's cell does not provide the basis for a
4 violation of his federal constitutional rights. Inmates have no reasonable expectation of privacy
5 in their cells or their possessions inside their cells. *Hudson v. Palmer*, 468 U.S. 517, 525-526
6 (1984); *See also Mitchell v. Dupnik*, 75 F.3d 517 (9th Cir. 1996) (jail officials did not violate a
7 prisoner's constitutional rights by searching his legal papers in his cell outside the presence of
8 the inmate).
9

10 It also appears, although it is not entirely clear, that Mr. Barton is attempting to state a
11 claim with regard to an infraction he received for sending a letter containing racial slurs to a
12 Department of Corrections officer. Apparently, the letter was found during a search of his cell.
13 Mr. Barton strongly denies that his letter contained racial slurs and contends that his letter was
14 confidential. ECF No. 13 at pp. 11-12. Arguably, these allegations may be construed as due
15 process claim. Regardless, this Court is prohibited from entertaining such a claim under
16 *Edwards v. Balisok*, 520 U.S. 641, 649 (1997) and *Heck v. Humphrey*, 512 U.S. 477, 487 (1997).
17 These two cases state that a prisoner may not bring a 42 U.S.C. § 1983 claim for damages if a
18 judgment in his favor would "necessarily imply the invalidity of the punishment imposed" at a
19 prison disciplinary hearing. Mr. Barton does not allege that he properly challenged the infraction
20 and that he has been exonerated at any level for the reasons set forth in that infraction.
21
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23 Although he was given several opportunities to do so, Mr. Barton has failed to file an
24 amended complaint or an explanation of why he should be allowed to bring a claim relating to
25 the infraction in a § 1983 action.
26

CONCLUSION

Mr. Barton was given an opportunity to show cause why his complaint should not be dismissed. He has failed to do so. His complaint is subject to dismissal for failure to state a claim. The dismissal should count as a “strike” under 28 U.S.C. § 1915(g). His motion to stay (ECF No. 46) should be denied as moot.

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from service of this Report to file written objections. See also Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of appeal. *Thomas v Arn*, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the Clerk is directed to set the matter for consideration on **October 25, 2013**, as noted in the caption.

DATED this 4th day of October, 2013.


Karen L. Strombom
United States Magistrate Judge